

The Origins of the Constitution

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When did the story of the Constitution begin? Some might say it began over 2500 years ago in the city-states of ancient Greece. Others might place its beginnings nearly three-quarters of a millennium back in the fields of Runnymede. Still others might say the Constitution had its origins three centuries or so ago during the tumultuous years of the seventeenth-century English revolutions. Or others, more patriotic perhaps, might date the beginnings of the Constitution from events in the Western Hemisphere, from the Mayflower Compact, the Massachusetts Charter of 1629, or from any number of charters and constitutional documents that the colonists resorted to during the first century and a half of American history. More likely, the story of the Constitution might begin with the imperial crisis and debate of the 1760s. It is just possible that the forty year between 1763 and 1803 in America were the greatest era in constitutionalism in modern Western history. Not only did Americans establish the modern conception of a constitution as a written document defining and delimiting the powers of government, but they also made a number of other significant constitutional contributions to the world, including the device of a convention for creating and amending constitutions, the process of popular ratification of constitutions, and the practice of judicial review by which judges measure ordinary legislation against the fundamental law of the constitution. During these brief forty years of great constitutional achievements between 1763 and 1803 the story of the Constitution of 1787 is only a chapter. But it is a crucial and significant chapter.

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It is hard for us today to appreciate what an extraordinary, unforeseen achievement the Constitution of 1787 was. We take a strong national government so much for granted that we can scarcely understand why the American Revolutionaries of 1776 did not create the Constitution at once. But in 1776 virtually no American contemplated something like the Constitution of 1787. No one in 1776 even imagined for Americans a powerful continental-wide national government operating directly on individuals. The colonists in the British empire had experienced enough abuses from far-removed governmental power to make them leery of creating another distant government. And besides, the best minds of the eighteenth century, including Montesquieu, said that a large continental-sized republic was a theoretical impossibility. In 1776 it was obvious to all Americans that their central government would have to be a confederation of some sort, some sort of league or alliance of the thirteen independent states. The Articles of Confederation created such a central government.

Confederation The Articles of Confederation were our first national constitution. Proposed by the Continental Congress in 1777, they were not ratified by all the states until 1781. Although we today pay very little attention to the Articles and can hardly take them seriously, at the time they were a remarkable achievement. The Articles created a much stronger federal government than many Americans expected; it was in fact as strong as any similar republican confederation in history. Not only were substantial powers concerning diplomacy, the requisitioning of soldiers, and the borrowing of money granted to the Confederation Congress, but the Articles specifically forbade the separate states to conduct foreign affairs, make treaties, and declare war. All travel restrictions and discriminatory trade barriers between the states were eliminated, and the citizens of each state were entitled to the "privileges and immunities" of the citizens of all states. When we compare these achievements with what the present-day European nations are struggling to attain in their own continental union, we can better appreciate what an extraordinary accomplishment the Articles represented.

Despite the notable strength of this Confederation, however, it was clear that it was something less than a unitary national government. Under the Articles the crucial powers of commercial regulation and taxation--indeed, all final lawmaking authority--remained with the states. Congressional resolutions were only recommendations to be left to the states to enforce. And should there be any doubts of the decentralized nature of the Confederation, Article 2 stated bluntly that "each State retains its sovereignty, freedom and independence, and every power, jurisdiction, and right, which is not by this confederation expressly delegated to the United States, in Congress assembled." The "United States of America" had a literal meaning that is unfamiliar to us today. The Confederation was based on the equal representation of each state in the Congress. It was less a single government than it was a treaty among sovereign states. It was intended to be and remained, as Article 3 declared, "a firm league of friendship" among states jealous of their individuality. Not only ratification of the Articles of Confederation but any subsequent amendment of them required the consent of all the states.

As a confederation the United States achieved a good deal, including the winning of the war and independence from Great Britain. But scarcely a half dozen years after the final ratification of the Articles in 1781, the Confederation was virtually moribund and nearly every American was calling for its reform. The Confederation government was not adequate to the demands of the 1780s; a more powerful central government was needed. the calling of the Philadelphia Convention in 1787 and the new Constitution were the results.

It seems to be a simple story, but it is not. For despite a general dissatisfaction with the Articles by 1786-87 and a general willingness to add to the powers of Congress, the Constitution that was created in 1787 was not what most people expected. The new federal government was not simply a stronger league of friendship with some additional powers granted to the Congress. It was a radically new government altogether--one that utterly formed the structure of central authority and greatly weakened the power of the states. The Constitution of 1787 created an overarching national republic that operated on individuals directly; its creation was inconceivable a decade earlier. What had happened? What could have changed America so dramatically? Given the Americans' loyalty to their states and their deep-rooted fears of centralized governmental authority, explaining the Constitution of 1787 is not as easy as it looks.

Some Americans in the 1780s talked about a crisis in the United States, and historians have seized upon this talk and labeled the 1780s "the Critical Period of American History." Yet documenting a real crisis in the society, a crisis sufficient to justify the radical change of government in 1787, is not a simple matter. To be sure, there was economic depression in 1784-85 caused by the buying spree and the overextensions of credit following the war, but by 1786 the country was coming out of it and people were aware of returning prosperity. Commerce was confused and disrupted, but the commercial outlook was far from bleak. American merchants were pushing out in every direction in search of markets and were sailing even as far away as China. The 1780s do not seem to be a time of crisis; they were in fact a time of unprecedented exuberance and expansion. The American population grew as never before (or since), and more Americans than ever were off in pursuit of happiness and prosperity. "There is not upon the face of the earth a body of people more happy or rising into consequence with more rapid stride, than the Inhabitants of the United States of America," the secret of the Continental Congress Charles Thomson wrote Thomas Jefferson in 1786. "Population is increasing, new houses building, new lands clearing, new settlements forming, and new manufacturers establishing with a rapidity beyond conception." The general mood was optimistic and expectant.

No wonder then that many historians have doubted that there was anything really critical happening in the society. Perhaps the critical period, wrote Charles Beard in his *An Economic Interpretation of the Constitution* published in 1913, was not really critical after all, "but a phantom of the imagination produced by some undoubted evils which could have been remedied without a political revolution." Perhaps the crisis, said Jackson Turner Main in his study of the *Antifederalists* in 1961, was only "conjured up" by a few leaders since "actually

the country faced no such emergency." Was the movement for the Constitution something of a fraud without justification in the social and economic reality of the day?

But then we have all those despairing statements by Americans in the 1780s declaring that America in the midst of a crisis more was serious than anything experienced during the darkest days of the war. Many believed that America's great experiment in republicanism was in danger and that America's "vices" were plunging the nation into "ruin." The enlightened Philadelphia physician Benjamin Rush went so far as to say that Americans were on the verge of "degenerating into savages or devouring each other like beasts of prey." Even the sober and restrained George Washington was astonished at the changes the few years since 1776 had produced: "From the high ground we stood upon, from the plain path which invited our footsteps, to be so fallen! so lost! it is really mortifying."

How can we explain such excited and despondent statements--statements that can be multiplied over and over? What had happened? Could Americans, so confident in 1776, have lost their nerve so quickly? Could any problems with the Articles of Confederation, with the weaknesses of the union, have brought forth such fearful hand wringing? Explaining the sense of crisis in the 1780s and hence the movement for the Constitution requires something more than just detailing the defects of the Confederation Congress. Such defects, however serious, could hardly account for the pervasive sense of crisis.

There are in fact two levels of explanation for the Constitution, two different sets of problems, two distinct reform movements in the 1780s that eventually came together to form the Convention of 1787. One operated at the national level and involved problems of the Articles of Confederation. The other operated at the state level and involved problems in the state legislatures. The national problems account for the ready willingness of people in 1786-87 to accede to the convening of delegates at Philadelphia. But the state problems, problems that went to the heart of America's experiment in republicanism, account for the radical and unprecedented nature of the federal government created in Philadelphia.

National Problems The weaknesses of the Articles of Confederation were apparent early, even before the Articles were formally ratified in 1781. By 1780 the war was dragging on longer than anyone had expected, and the skyrocketing inflation of the paper money that was being used to finance it was unsettling commerce and business. The Articles barred congressional delegates from serving more than three years in any six-year period, and leadership in the Confederation was changeable and confused. The states were ignoring congressional resolutions and were refusing to supply their allotted contributions to the central government. The Congress stopped paying interest on the public debt. The Continental army was smoldering with resentment at the lack of pay and was falling apart through desertions and even outbreaks of mutiny. All these circumstances were forcing various groups, including the army and merchant and creditor interests centered in the mid-Atlantic states, to seek to add to the powers of the Congress. They tried to strengthen the Congress by broadly interpreting its enumerated powers, by directly amending the Articles, and even by threatening military force against those states that did not fulfill their obligations to Congress.

A shift in congressional leadership in the early 1780s demonstrated the increasing influence of these concerned groups. Older popular radicals such as Richard Henry Lee of Virginia and Samuel Adams of Massachusetts were replaced by such younger men as James Madison of Virginia and Alexander Hamilton of New York. These new leaders were more interested in authority and stability than in popular liberty. Disillusioned by the Confederation's ineffectiveness, these nationalists in the Congress set about reversing the localist and centrifugal thrust of the Revolution. They strengthened the regular army at the expense of the militia and promised pensions to the Continental army officers. They reorganized the departments of war, foreign affairs, and finance in the Congress and replaced the committees that had been running these departments with individuals.

The key man in the nationalists' program was Robert Morris, a wealthy Philadelphia merchant who was made superintendent of finance and virtual head of the Confederation in 1781. Morris undertook to stabilize the economy and to involve financial and commercial groups with the central government. He persuaded the Congress to recommend to the states that paper-money laws be repealed and to require that the states' contributions to the general expenses be paid in specie (gold or silver coin) and he sought to establish a bank to make the federal government's bonds more secure for investors.

Carrying out this nationalist program depended on amending the Articles so as to grant the Confederation the power to levy a 5 percent duty on imports. Once the Congress had revenues independent of the states, the Confederation could pay its debts and would become more attractive to prospective buyers of its bonds. Although Morris was able to get the Congress to charter the Bank of North America, the rest of the nationalists' economic proposals failed to get the consent of all the states. In 1782 congressional efforts to get the states to approve the 5 percent import amendment foundered first on Rhode Island's refusal and then on Virginia's. When a compromise attempt in 1783 to get a revenue for Congress also came to nothing, those who hoped to reform the Articles became increasingly discouraged.

After the victory at Yorktown in October 1781 and the opening of peace negotiations with Great Britain, the states rapidly lost interest in the Congress. Some nationalists even sought to use the unrest in the army to further their cause. The prospect of the Congress' demobilizing the army without fulfilling its promises of back pay and pensions created a crisis that brought the United States as close to a military coup d'etat as it has ever been. In March 1783 the officers of Washington's army, encamped at Newburgh on the Hudson River, issued an address to the Congress concerning their pay and actually consider some sort of military action against the Confederation. Only when Washington personally intervened and refused to support a movement that he said was designed "to open the floodgates of civil discord, and deluge our rising empire in blood" was the crisis averted.

Before resigning his commission as commander-in-chief, Washington in June 1783 wrote a circular letter to the states, which he called his "legacy" to the American people. In it he recommended the creation of "a supreme power to regulate and govern the general concerns of the confederated republic." This was the moment, said Washington, "to give such a tone to our federal government as will enable it to answer the ends of its institution." It was a time of testing for the American people, "the eyes of the whole world are turned upon them." Upon the willingness of the states to grant sufficient power to Congress to fulfill its needs and preserve its credit depended whether the United States would "be respectable and prosperous, or contemptible and miserable, as a nation . whether the revolution must ultimately be considered as a blessing or a curse . not to the present age alone" but also to "unborn millions."

Yet news of the peace treaty with Great Britain shattered much of this wartime unionist sentiment, and Washington's pleas for strengthening the central government were smothered by the reassertion of traditional state loyalties and jealousies. By December 1783 the Congress, in Thomas Jefferson's opinion, had lost most of its usefulness. "The constant session of Congress," he said, "can not be necessary in time of peace." After clearing up the most urgent business, the delegates should "separate and return to our respective states, leaving only a Committee of the states," and thus "destroy the strange idea of their being a permanent body, which has unaccountably taken possession of the heads of their constituents."

Congressional power, which had been substantial during the war years, now began to disintegrate. The congressional delegates increasingly complained of how difficult it was just to gather a quorum. The Congress could not even agree on a permanent home for itself. it wandered from Philadelphia to Princeton, to Annapolis, to Trenton, and finally to New York City. The states reclaimed their authority and began taking over the payment of the federal debt that many individuals had earlier hoped to make the cement of union. By 1786 nearly one-

third of the Confederation's securities had been converted into state bonds, thus creating a vested interest among public creditors in the sovereignty of the individual states. Under these circumstances the influence of those, in Alexander Hamilton's term, "who think continentally" rapidly declined, and the chances of amending the Confederation piecemeal declined with them.

The Confederation's inability to regulate its international commerce led to even more confusion and frustration. Both northern merchants and southern planters needed to penetrate the markets of the European empires with American produce. Southern agrarian leaders such as Jefferson and James Madison feared that if the European mercantilist states prohibited American farmers from selling their surplus crops freely in their empires, American society would be decisively affected. Not only would the industrious character of the American farmers be undermined, but if Americans could not sell abroad the United States would be unable to pay for the manufactured goods imported from Europe, and therefore would have to develop large-scale manufacturing for itself. This industrialization would in turn create in America the same moribund manufacturing cities and the same corrupt, rank-conscious and dependent societies that existed in Europe. Under these conditions the independent farmer-citizenry which sustained American republicanism could not long endure.

Yet the mercantilist empires of the major European nations remained generally closed to the new republic in the 1780s. John Adams in Britain and Jefferson in France made strong diplomatic efforts to develop new international commercial relationships based on the free exchange of goods, but these efforts failed. The French refused to take as much American produce as had been expected, and Britain effectively closed its markets to competitive American goods while recapturing American consumer markets for its own products. The Confederation lacked the authority to retaliate with its own trade regulations, and state and sectional jealousies blocked several attempts to grant the Congress a restricted power over commerce. The Confederation Congress watched helplessly as the separate states attempted to pass conflicting navigation acts of their own. By the mid-1780s Connecticut was laying even heavier duties on goods from Massachusetts than on those from Great Britain.

The Confederation felt its lack of power internationally as much as it did domestically. Abroad the reputation of the United States dwindled as rapidly as did its credit. The Dutch and French would lend money only at extraordinary rates of interest. Since American ships now lacked the protection of the British flag, many of them were seized by corsairs from the Muslim states of North Africa, and their crews sold as slaves. The Congress had no money to pay the necessary tribute and ransoms to these Barbary pirates.

In the late-eighteenth century world of hostile empires, it was even difficult for the new republican confederacy to maintain its territorial integrity. Britain refused to send a diplomatic minister to the United States and ignored its treaty obligations to evacuate its military posts in the Northwest, claiming that the United States had not honored its own commitments. The treaty of peace had specified that the Confederation would recommend to the states that loyalist property that had been confiscated during the Revolution be restored, and that neither side would make laws obstructing the recovery of prewar debts. When the states flouted these treaty obligations, the impotent Confederation could do nothing; and therefore British troops remained in Detroit, Niagara, Oswego and other posts within American territory.

Britain was known to be plotting with the Indians and encouraging separatist movements in the Northwest and in the Vermont borderlands, and Spain was doing the same in the Southwest. Spain in fact refused to recognize American claims to the territory between the Ohio River and Florida. In 1784, in an effort to influence American settlers moving into Kentucky and Tennessee, Spain closed the Mississippi River to American trade. Many of the Westerners were ready to deal with any government that could ensure access to the sea for their agricultural produce. As Washington noted in 1784, they were "on a pivot. The touch of a feather would turn them any way."

In 1785-86, John Jay, a New Yorker and the secretary of foreign affairs, negotiated a treaty with the Spanish minister to the United States, Diego de Gardoqui. By the terms of this agreement, Spain was opened to American trade in return for America's renunciation of its right to navigate the Mississippi for several decades. Out of fear of being denied an outlet to the sea 'in the West, the southern states prevented the necessary nine-state majority in the Congress from agreeing to the treaty. But the willingness of a majority of seven states to sacrifice western interests for the sake of northern merchants aroused long-existing sectional jealousies and threatened to shatter the Union. In an address to the Congress in August 1786 Jay defended his treaty on the grounds that it was the best the United States could get from Spain, at least until it "shall become more really and truly a nation than it at present is."

By 1786 these problems made revision of the Articles of Confederation inevitable. Even those who later opposed the Constitution. acknowledged that the Confederation Congress needed additional powers. Reform of the Articles by piecemeal amendment had run afoul of the jealousies of one state or another, and many were now looking toward some sort of convention of all the states as a solution.

Although some like Hamilton had suggested the calling of a national convention as early as 1780, the events in the mid-eighties that led to the Philadelphia Convention actually began as continuations of earlier attempts to strengthen the union within the framework of the Articles. The desire to grant Congress the power to regulate foreign trade was the stimulus. In 1785, at a conference at Mount Vernon, Virginia and Maryland resolved a number of disputes concerning the navigation of Chesapeake Bay and the Potomac River. This conference suggested the advantages of independent state action and led to Virginia's invitation to the states to meet at Annapolis in 1786 "to consider and recommend a federal plan for regulating commerce." Some hoped to make this Annapolis meeting a prelude to a full convention for amending the Articles. Madison was one of these, "yet," as he told Jefferson in August 1786, "I despair much of its accomplishment at the present crisis that I do not extend my views beyond a Commercial Reform. To speak the truth I *almost despair even of this.*" But with only delegates from five states in attendance, the Annapolis meeting had little choice but to calling another convention. stakes now were higher and this convention would have to be concerned with more than matters of commercial regulation. After only two days of discussion, the Annapolis delegates issued a report drafted by Hamilton requesting the states to elect delegates to a second convention to be held in Philadelphia on the second Monday in May of the following year "to devise such further provisions as shall appear to them necessary to render the constitution of the federal government adequate to the exigencies of the Union." After seven states agreed to send delegates to Philadelphia, the Confederation Congress belatedly recognized this independent state action and in February 1787 authorized the approaching convention to meet "for the sole and express purpose of revising the Articles of Confederation."

Although by 1787 nearly all of America's political leaders agreed that some reform of the Articles was necessary, few expected what the Philadelphia Convention eventually created. For the new national government framed in 1787 went way beyond what the weaknesses of the Articles demanded. Granting the Congress the authority to raise revenue, to regulate trade, to pay off its debts, and to deal effectively in international affairs did not require the total scrapping of the Articles and the formation of an extraordinary powerful and distant national government the like of which was beyond anyone's imagination a decade earlier. The new Constitution of 1787 therefore cannot be explained by the obvious and generally acknowledged defects of the Articles of Confederation. Something more serious lay behind the proposals, deliberations, and resultant Constitution of the Philadelphia Convention.

State Politics By the mid-1780s a number of American leaders were alarmed by politics within the states. The Revolutionaries in 1776 had placed great faith in the ability of the state legislatures to promote the public good. The new Revolutionary state constitutions had made the state legislatures more representative, had greatly increased their size, and had granted

enormous power to them. But in the years after 1776 the state legislatures did not fulfill the Revolutionaries' initial expectations. The Revolution unleashed acquisitive and commercial interests that no one had quite realized existed in American society, and these factional interests were demanding and getting protection and satisfaction from state legislatures that were elected annually (an innovation in most states) by the broadest electorates in the world. Everywhere in the state electioneering and the open competition for office increased, and new petty uneducated entrepreneurs like Abraham Yates, a part-time lawyer and shoemaker of Albany, and William Findley, a Scotch-Irish ex-weaver of western Pennsylvania, used popular electoral appeals to vault into political leadership in the state legislatures.

The rapid turnover of seats and the scrambling among different interests made lawmaking seem chaotic. Laws, as the Vermont Council of Censors said in 1786, were "altered--realtored--made better--made worse; and kept in such a fluctuating position that persons in civil commission scarce know what is law." In fact, noted James Madison, more laws were enacted by the states in the decade following Independence than in the entire colonial period--all in response to pressures from shifting factions. Madison could only conclude sadly that a spirit of *locality* in the state legislatures was destroying "the aggregate interests of the community." In all the states the representatives, said Ezra Stiles, president of Yale College, were concerned only with the special interests of their electors. Whenever a bill was read in the legislature, "every one instantly thinks how it will affect his constituents." Appealing to the people therefore had none of the beneficial effects that good republicans had expected. A bill in Virginia having to do with court reform was "to be printed for consideration of the public," said Madison; but "instead of calling forth the sanction 'of the wise & virtuous,' this appeal to the public, Madison feared, would only "be a signal to interested men to redouble their efforts to get into the Legislature." Democracy, in other words, was no solution to the problem; it was the problem. Pandering to voters and horse-trading politics were not what many Americans had expected from the Revolution.

By the mid-1780s many American leaders were convinced that the state legislatures and majority factions within those legislatures had become the greatest source of tyranny in America. The legislatures were swallowing up the powers of the other branches of government and were passing stay laws, paper money bills, and other debtor relief legislation in violation of the rights of creditors and other minorities. Such tyranny struck at the heart of America's experiment in republicanism, for, said Madison, it brought "into question the fundamental principle of republican Government, that the majority who rule in such governments are the safest Guardians both of public Good and private rights."

These abuses of power by the state legislatures, more than the defects of the Articles of Confederation, were the real source of the crisis of the 1780s; and ultimately it was these abuses that lay behind the radical reform of the central government. The confusing and unjust laws coming out of the state legislatures, Madison informed Jefferson in Paris in October 1787, had become "so frequent and so flagrant as to alarm the most steadfast friends of Republicanism," and these abuses "contributed more to that uneasiness which produced the Convention, and prepared the public mind for a general reform, than those which accrued to our national character and interest from the inadequacy of the Confederation to its immediate objects."

In 1786 a rebellion of nearly 2,000 debtor farmers who were threatened with foreclosure of their mortgaged property broke out in western Massachusetts. This rebellion, led by a former militia captain, Daniel Shays, confirmed many of these anxieties about state politics. The insurrection, which temporarily closed the courts and threatened a federal arsenal, occurred in the very state that was considered to have the best-balanced constitution. Although Shays' rebels were defeated by militia troops, his sympathizers were victorious at the polls early in 1787. The newly-chosen state representatives soon enacted debtor relief legislation that added to the growing fears of legislative tyranny.

By 1787 many expected the Philadelphia Convention to solve not only the problems of the Articles Of Confederation but also the problems of state politics. Two different and hitherto separate reform movements now came together to save both the Congress from the states and the states from themselves. At the national level, various groups--public creditors, merchants, diplomatic officials--had long been trying to amend the Articles. Now they were joined by others: urban artisans who hoped that a stronger national government would prevent competition from British imports; and Southerners who wanted to gain representation in the national government proportional to their growing numbers. But reinforcing these groups clamoring for changes in the Articles were also those deeply concerned with the problems of state politics. It was these state problems that ultimately forced Americans to' redefine the crisis they faced in the most momentous terms. Since majoritarian tyranny and the legislative abuses of the states flowed from the Revolutionary aim of increasing the participation of the people in government, the very success of the Revolutionary experiment in popular government was at stake. Thus creating a new central government was no longer simply a matter of cementing the Union or standing firm in foreign affairs or satisfying the demands of particular creditor, merchant, and artisan interests. It was now a matter, as Madison declared, that would "decide for ever the fate of Republican Government."

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